

FCC MAIL SECTION
Federal Communications Commission

DA 97-1801

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Before the
Federal Communications Commission
DISPATCHED BY Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 96-161
Table of Allotments,)	RM-8842
FM Broadcast Stations.)	
(Carlisle, Irvine, and)	
Morehead, Kentucky))	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 13, 1997;

Released: August 25, 1997

By the Chief, Allocations Branch:

1. At the joint request of James P. Gray, licensee of Station WCAK(FM), Channel 264A, Carlisle, Kentucky; Kentucky River Broadcasting Company, licensee of Station WCYO(FM), Channel 291A, Irvine, Kentucky; and WMOR, Inc.,¹ licensee of Station WMOR-FM, Channel 221A, Morehead, Kentucky ("petitioners"), the Commission has before it the Notice of Proposed Rule Making, 11 FCC Rcd 8743 (1996), proposing the substitution of Channel 221C3 for Channel 264A at Carlisle; the substitution of Channel 264C3 for Channel 291A at Irvine; the substitution of Channel 291C3 for Channel 221A at Morehead, and the modification of the stations' respective licenses accordingly. Petitioners filed comments in support of the proposal reaffirming their intention to apply for the respective channels, if allotted. Comments, counterproposal and supplement were filed by East Kentucky Broadcasting Corporation ("East Kentucky").²

2. As indicated in the Notice, petitioners state that their stations are limited in power and that they are prohibited from upgrading their facilities on their own or adjacent channels due to spacing restrictions presented by their respective stations. Petitioners

¹We note that WMOR, Inc. has changed its name to Morehead Broadcasting Company.

²We note that on July 2, 1997, after the deadline for filing counterproposals in this proceeding had expired, East Kentucky filed a Petition for Rule Making requesting the substitution of Channel 221A for Channel 276A at Elkhorn City, Kentucky, and to accommodate the channel change, the substitution of Channel 276A for Channel 221A at Clinchco, Virginia, in the event its counterproposal is dismissed in the instant proceeding.

assert that the proposed nonadjacent upgrades constitute "incompatible channel swaps" and should be protected from competing expressions of interest consistent with the adjacent channel upgrade provisions of Section 1.420(g)(3) of the Commission's Rules.

Section 1.420(g)(3) allows the modification of a station's license to a higher class channel if the channel is a co-channel or adjacent channel mutually exclusive with the existing license. However, the Commission has acknowledged that it will consider analogous proposals involving channel substitutions at other communities which would be necessary to create a mutually exclusive relationship required under Section 1.420(g)(3), and has determined to consider these "incompatible channel swaps" on a case-by-case basis. See Modification of FM Broadcast Licenses to Higher Class Co-Channel or Adjacent Channels, 60 RR 2d 114, 120 (1986).

3. In its comments and counterproposal, East Kentucky proposes two options to effectuate its upgrade at Elkhorn City, Kentucky. The first option proposes an "incompatible channel swap" by substituting 221C3 for Channel 276A at Elkhorn City, Kentucky, and by substituting Channel 276A for Channel 221A at Clinchco, Virginia. The second option proposes the substitution of Channel 275A for Channel 221A at Morehead, Kentucky; the substitution of either Channel 269A or 295A for Channel 275A at West Liberty, Kentucky; the same "incompatible channel swap" of Channel 221C3 for Channel 276A at Elkhorn, Kentucky, and the substitution of Channel 276A for Channel 221A at Clinchco, Virginia. We will not consider either option in the context of this proceeding. There are two reasons for not doing so. First of all, a counterproposal is a proposal for an alternative and mutually exclusive allotment or set of allotments in the context of the proceeding in which the proposal is made. See Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments 5 FCC Rcd 931 (1990). In regard to this proceeding, the first option is merely contingent on the proposed Channel 291C3 upgrade at Morehead, Kentucky. In order to accommodate the upgrade at Elkhorn City, the second option proposes, among other substitutions, the substitution of Channel 275A for Channel 221A at Morehead, Kentucky. Although both options are contingent on the removal of Station WMOR-FM from Channel 221A at Morehead, Kentucky, there is no mutually exclusivity between the proposed upgrades at Carlisle, Irvine, or Morehead, Kentucky and the proposed upgrade at Elkhorn City, Kentucky, or any related channel change proposed to accommodate this upgrade. Moreover, Station WMOR-FM has expressed an interest in an Class C3 allotment, and does not wish to remain as a Class A facility as proposed in East Kentucky's second option.

4. Second, counterproposals are required to be "technically correct and substantially complete" at the time of their filing. See e.g., Fort Bragg, California, 6 FCC Rcd 5817 (1991); Provincetown, et al., Massachusetts, 8 FCC Rcd 19 (1992); and Sanford and Robins, North Carolina, 12 FCC Rcd 1 (1997). Clearly, East Kentucky's counterproposal was not "technically correct and substantially complete" at the time it was

filed because it is short-spaced to the presently licensed site of Station WMOR-FM, Channel 221A, Morehead, Kentucky. Proposals and counterproposals are supposed to be capable of being effectuated at the time they are granted and cannot be contingent upon future actions. In this regard, since some authorized facilities are never built and licensed, we cannot assume that such facilities are in existence for the purpose of resolving related rulemaking matters. See e.g., Cut and Shoot, Texas, 11 FCC Rcd 16383 (1996).

5. In consideration of the above, we believe the public interest would be served by substituting Channel 221C3 for Channel 264A at Carlisle, Kentucky; substituting Channel 264C3 for Channel 291A at Irvine, Kentucky; and by substituting Channel 291C3 for Channel 221A at Morehead, Kentucky, since the upgrades would enable Stations WCAK(FM), WCYO(FM) and WMOR-FM to expand their FM service areas.³ An engineering analysis has determined that Channel 221C3 can be allotted to Carlisle in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.1 kilometers (8.1 miles) east;⁴ Channel 264C3 can be allotted to Irvine with a site restriction of 7.7 kilometers (4.8 miles) west to avoid short-spacings to the licensed sites of Station WWYC(FM), Channel 261C2, Winchester, Kentucky, and Station WSGS(FM), Channel 266C, Hazard, Kentucky;⁵ and Channel 291C3 can be allotted to Morehead with a site restriction of 3.6 kilometers (2.3 miles) west to avoid a short-spacing to the licensed site of Station WMST-FM, Channel 288A, Mount Sterling, Kentucky.⁶ As requested, we shall modify the licenses of Stations WCAK(FM), WCYO(FM) and WMOR-FM to specify operation on Channels 221C3, 264C3 and 291C3, respectively.

6. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61,

³The upgrades are being treated under the provisions of Section 1.420(g)(3) of the Commission's Rules because the channel substitutions for the upgrades fulfill the requirements for "incompatible channel swaps." Specifically, the channel substitutions are each mutually exclusive and are uniquely available, i.e., there are no alternate channels of their class that are fully-spaced from the stations' sites. See Modification of FM Broadcast Licenses to Higher Class Co-channels or Adjacent Channels, *supra*.

⁴The coordinates for Channel 221C3 at Carlisle are North Latitude 38-17-42 and West Longitude 83-52-32.

⁵The coordinates for Channel 264C3 at Irvine are North Latitude 37-43-27 and West Longitude 84-02-38.

⁶The coordinates for Channel 291C3 at Morehead are North Latitude 38-11-17 and West Longitude 83-28-37. We note that the coordinates are short-spaced to Station WFLE-FM, Channel 292A, Flemingsburg, Kentucky. However, pursuant to Report and Order, MM Docket No. 95-137, Station WFLE-FM's license has been modified to specify operation on Channel 236A at Flemingsburg and that proceeding has become final. See 11 FCC Rcd 6374 (1996). We will provide the licensee of Station WFLE-FM with a copy of this Report and Order.

0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED. That effective October 9, 1997, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

<u>City</u>	<u>Channel No.</u>
Carlisle, Kentucky	221C3
Irvine, Kentucky	264C3
Morehead, Kentucky	242A, 291C3

7. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of James P. Gray, for Station WCAK(FM), Carlisle, Kentucky, IS MODIFIED to specify operation on Channel 221C3 in lieu of Channel 264A, subject to the following conditions:

(a) Within 90 days of the effective date of this Order, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

8. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Kentucky River Broadcasting Company, for Station WCYO(FM), Irvine, Kentucky, IS MODIFIED to specify operation on Channel 264C3 in lieu of Channel 291A, subject to the following conditions:

(a) Within 90 days of the effective date of this Order, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

9. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Morehead Broadcasting Company for Station WMOR-FM, Morehead, Kentucky, IS MODIFIED to specify operation on Channel 291C3 in lieu of Channel 221A, subject to the following conditions:

(a) Within 90 days of the effective date of this Order, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

10. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, **if the request is granted**, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, James P. Gray, Kentucky River Broadcasting Company, and Morehead Broadcasting Company, licensees of Stations WCAK(FM), WCYO(FM) and WMOR-FM, respectively, are required to submit a rule making fee in addition to the fee required for the application to effect the respective upgrades.

11. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this Report and Order by Certified Mail, Return Receipt Requested, to the following:

James P. Gray
10 Trinity Place
Fort Thomas, Kentucky 41075
(Licensee of Station WCAK(FM))

Kentucky River Broadcasting Company
P.O. Box 281
Irvine, Kentucky 40336
(Licensee of Station WCYO(FM))

Morehead Broadcasting Company
P.O. Box 940
Morehead, Kentucky 40351
(Licensee of Station WMOR-FM)

Fleming County Broadcasting, Inc.
P.O. Box 452
Flemingsburg, Kentucky 41041
(Licensee of Station WFLE-FM)

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.
13. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau